IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.149 OF 2005

Yakub Chandrakant Poll ...Petitioner

vs.

Smt.Anita Yakub Poll & Ors. ...Respondents

Mr.J.M.Puranik for the Petitioner
Mr.D.P.Dindikar for the Respondents
Ms Rajashree M. Gadhvi,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : JUNE 16,2005.

P.C.:

1. This Petition was fully heard on 8th June 2005 and was kept today as the learned Counsel for the Petitioner sought time to ascertain whether the Petitioner is in position to pay any amount by way of maintenance. The learned Counsel appearing for the Petitioner stated that the Petitioner is not in a position to pay any amount.

2. This Petition arises out of an Application under Section 125 of the Code of Criminal Procedure, 1973 filed by the Respondent No.1 wife for grant of maintenance. The said application was filed by the Respondent No.1-wife on behalf of the Respondent Nos.2 and 3 who are minor children of the Petitioner and the Respondent No.1. In the said application an application for interim maintenance was filed. By order dated 12th April 2002 the said application for interim maintenance was allowed. The Petitioner was directed to pay interim maintenance of Rs.400/- to the Respondent No.1 and

Rs.300/- each to the Respondent Nos.2 and 3 from the date of said application. On 7th April 2003 an application was made by the Respondent No.1 pointing out that the Petitioner had not complied with the order directing the payment of interim maintenance and therefore, a prayer was made under Sub Section 3 of Section 125 of the said Code for issuing warrant of arrest. On the said application an order was passed by the learned Joint C.J.J.D. & J.M.F.C., Ulhasnagar directing detention of the Petitioner. Even after passing the said order the Petitioner did not comply with the order and therefore an application was made on 5th January 2005 by the Respondent No.1 for issuing arrest warrant. By the order passed on the same day, the learned Joint C.J.J.D. & J.M.F.C., Ulhasnagar held that against the earlier order dated 7th April 2003 the Revision Application filed by the Petitioner has been rejected and in spite of direction given on 20th October 2004 to clear the arrears the Petitioner has not paid a single penny. The learned Judge recorded that on that day also the Petitioner was not willing to pay the interim maintenance. Hence the Petitioner was sentenced to suffer simple imprisonment for one month.

3. In the meanwhile, it appears that on 27th October 2004 an application was made by the Petitioner under Section 127 of the said Code praying for recalling the order directing the payment of interim maintenance. The Petitioner filed Criminal Revision Application No.2 of 2005 for challenging the order

dated 5th January 2005 of detention and applied for grant of stay. By order dated 10th January 2005 the order was stayed subject to the condition of the Petitioner depositing a sum of Rs.12,500/-. The said amount was not deposited by the Petitioner and therefore the present Petition has been filed for challenging the order dated 5th January 2005 passed by the learned Joint C.J.J.D. & J.M.F.C.,Ulhasnagar as well as the said interim order passed by the II Ad hoc Additional Sessions Judge, Kalyan.

4. The learned Counsel appearing for the Petitioner submitted that the application made by the Petitioner under Section 127 (2) of the said Code for recalling the order directing interim maintenance is still pending. He submitted that without deciding the said application, the learned Judge could not have passed order under Section 125 (3) of the said Code. He submitted that considering the fact that the order of detention was passed, the learned Additional Sessions Judge was not justified in granting conditional stay during the pendency of Revision Application.

5. The learned Counsel appearing for the Respondent Nos.1 to 3 has opposed the Petition and has pointed out that the order passed by the Court is not being implemented for such a long time and as a result the Respondent Nos.1 and the two minor children are suffering.

6. I have considered the rival submissions. It is pertinent to note that in the application for stay filed by the Petitioner before the Sessions Court in the pending revision, the Petitioner has not come out with a case that he does not have means to pay the maintenance or that he is incapable of earning. There is nothing on record to show the Petitioner is not an able bodied person. In fact, in the application for stay a specific assertion has been made by the Petitioner that he is ready and willing to abide by the terms and conditions which may be imposed by the learned Additional Sessions Judge for grant of stay of operation of the order. The learned Additional Sessions Judge took a liberal view and directed the Petitioner to pay only one half of the arrears of maintenance amount as a condition for grant of stay of operation of order dated 5th January 2005.

7. It is pertinent to note that the Petitioner made an Application under Section 340 of the said Code before the learned Joint C.J.J.D. & J.M.F.C.,Ulhasnagar praying for ordering enquiry under Section 340 against the Respondent No.1. All that the Petitioner stated in the said Application was that he was unemployed and he has no source of income. There is no assertion in the said application that he has no earning capacity.

8. Notwithstanding the recalcitrant conduct on the part of the Petitioner, the learned Additional Sessions Judge, Kalyan

protected the Petitioner by granting stay subject to deposit of Rs.12,500/-. However, the Petitioner has not taken benefit of the said order and he has chosen to challenge the said order. The Petitioner has not offered to pay any amount till today.

9. In the circumstances, considering the conduct of the Petitioner it is impossible to interfere with the orders impugned in this Petition under Article 227 of the Constitution of India. Before I conclude the Judgment, it is to be noted here that this Court had appointed Mr.R.S.Apte, Advocate as Mediator who has submitted a failure report.

10. Hence I pass the following order :

i) Writ Petition is dismissed.

ii) Time of three weeks from today is granted to the Petitioner to comply with the order dated 10th January 2005 passed by the learned II Ad hoc Additional Sessions Judge, Kalyan in Revision Application No. 2 of 2005. If the Petitioner fails to comply with the said order directing deposit of a sum of Rs.12,500/- within a period of three weeks from today, the order dated 5th January 2005 passed by the learned Joint C.J.J.D. & J.M.F.C., Ulhasnagar below application at Exh.34 in Misc. Application No. 27 of 2001 will become operative and will be forthwith implemented.

JUDGE